WATER MANAGEMENT IN ALBERTA

CHALLENGES FOR THE FUTURE

BACKGROUND PAPER

VOLUME 2

WATER RIGHTS

Alberta
ENVIRONMENT

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SUMMARY

VOLUME 2: WATER RIGHTS

Many sections of the Water Resources Act are close to a century old. Before considering revisions to the legislation, it is helpful to understand the history, workings, and enforcement of the current Act. Volume two contains three sections with this information: "History of Water Management Legislation in Alberta", "Water Rights", and "Enforcement".

CHAPTER 1: HISTORY OF WATER MANAGEMENT LEGISLATION IN ALBERTA

LATE 1880s	The idea of legislation to manage Alberta's water is raised when a drought causes crops to wither and farms to fail.
1894	The first water management law, the ***North-West Irrigation Act*** is passed. It introduce a licensing scheme and rules for the acquisition of water rights.
1919	Legislation (***The Dominion Water Power Act***) governing hydroelectric development is passed.
1920	Major changes occur in the ***Irrigation Act*** as it is now named. A reallocation priority is created and a reservation power is established.
1930	The ***Natural Resources Transfer Agreement*** is passed to give Alberta the same control over its resources that the original provinces had.
1931	The ***Alberta Water Resources Act*** is passed.
1940	A power to amend licences is added to the Act.
1962	The regulation of Groundwater is added to the Act for the first time.
1971	Several changes are made to the ***Water Resources Act.*** Conditions can now be added to interim licences. The Act is made applicable to water management projects belonging to the provincial government. A wider definition of the non-consumptive activities regulated by the Act is created.
1981	The Act is amended to state that all water on or under the surface of the ground is owned by the provincial government.

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CHAPTER 2: WATER RIGHTS

The ***Water Resources Act*** deals with the allocation and use of water resources in Alberta. It establishes the province as owner and manager of its water. The basic principles of the Act have remain unchanged over the years despite amendments, but with the heavy demands placed on water supplies in the last few years, these basic principles are no longer adequate.

There are some fundamental problems in the Act that need to be addressed such as the transferability of water rights. Making transferability more flexible could allow licensees to enhance their operations. Other problems include the absence of incentives to conserve water, and the lack of provisions for protecting instream flow needs or for river basin planning.

Updated water management legislation could improve water resources management by providing some clear definitions for terms such as water, domestic use, natural state, waste, and conservation. Other provisions could set up guidelines for water management and create a rotation system among users during shortages. The background paper explains further items for consideration.

CHAPTER 3: ENFORCEMENT

Enforcement of the ***Water Resources Act*** focuses on the following objectives:

- ensuring that the purposes of the Act are followed including protecting the water rights of all water users,
- monitoring of licensed projects for compliance with and conditions of the authorization (licence or permit); and,
- ensuring that unauthorized works are rendered ineffective.

Currently, enforcement of the Act uses the following techniques:

- requesting compliance
- the issuing of Ministerial Orders to direct compliance with an interim licence or licence
- prosecution
- the issuing of Ministerial Orders to render works ineffective
- Ministerial authorization for department staff and equipment to render works ineffective.

There are several enforcement issues to be considered in the revision of legislation. For example:

- to what extent should the enforcement philosophy of the ***Water Resources Act*** be consistent with that adopted under other environmental statutes?

In particular, how should it relate to the ***Alberta Environmental Protection and Enhancement Act*** ? Should Alberta Environment continue with the present enforcement procedure?

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HISTORY OF WATER MANAGEMENT LEGISLATION

INTRODUCTION

Many sections of the ***Water Resources Act*** are close to a century old. Before considering how to improve the Act, it is helpful to understand its history.

The idea of legislation to manage Alberta's water was first raised in the late 1800s. European settlers who had made their home on the semi-arid prairies of the south had been bitterly disappointed when a drought that began in 1887 caused crops to wither and farms to fail.

To those settlers, particularly people like William Pearce, Ora Card, and Charles Magrath, the way to save the region from agricultural disaster was to provide irrigation. Irrigation, by making up for the naturally low precipitation, would make it possible for farmers and ranchers to survive the periodic droughts.

Large-scale irrigation, though, was not compatible with the law that governed the allocation of surface water in Western Canada. That law, called the doctrine of riparian rights, was derived from court decisions in England and eastern North America where water is more abundant. Under that doctrine, only a riparian landowner (a person whose land is adjacent to a water body) can divert water. This right to divert water is limited to domestic use except where the diversion of water for non-domestic purposes such as irrigation does not create a noticeable decrease in the amount or quality of water available to other riparian landowners.

Riparian rights present two major obstacles to irrigation on the prairies. First, the diversion of water to non-riparian land is prohibited thus limiting irrigation to the small portion of land that is adjacent to water bodies. Second, since a noticeable decrease in flow is not allowed, it would have seldom been possible to divert the large amounts of water necessary for irrigation. Except during those times when water is plentiful, irrigators would have found their use of water stopped by downstream riparian owners exercising their rights to streamflow comparable to natural conditions.

FEDERAL ADMINISTRATION

Following the groundswell of support for irrigation in the 1880s, the job of finding a law to replace riparian rights fell to the federal government. At the time, the land that eventually became the Province of Alberta was under federal jurisdiction.

1894 - The First Water Management Law

After reviewing the experience with water management legislation in the western United States and Australia, the federal government passed the ***North-West Irrigation Act*** in 1894. That law set up a system for licensing the use of surface water; ground water was not brought under the legislation until 1962.

The first objective of the new law was to eliminate the restrictions imposed by riparian rights. The federal government did this by laying claim to the right to use all water except any water that had been put to use before the law was passed. This made it possible for the government to issue rights in the form of licences for all the water that it then controlled and to permit the large withdrawals of water necessary to make irrigation viable on all land, whether riparian or not.

Riparian rights did not disappear, however. It is likely that a riparian landowner's right to divert water for domestic use continues to exist along with the right of a riparian landowner to stop a diversion that has not been approved. The extent to which riparian rights co-exist with water management legislation is still a subject of debate.

To further solidify the government's ownership of water rights, the law stipulated that after 1894 no one could acquire a water right by length of use. This provision eliminated prescriptive rights which are rights that can be acquired simply because an activity has occurred over a long period of time.

The second objective of the 1894 law was to provide centralized control of the water allocation process. This was accomplished by stipulating that all diversion and use of water had to be approved by the government and by establishing a detailed process for approving projects for the use of water. This process included requirements for water rights applications, construction and inspection of projects, and notification of the public. With this set of rules, the law brought greater consistency and accountability to the development of water use projects. In particular, the law significantly improved the government's ability to regulate the safety and reliability of dams, canals, and other works. The third objective of the 1894 law was to protect those who depend on an adequate supply of water. Foremost among these protective measures was the principle of prior allocation. Commonly referred to as the "first in time, first in right" rule, prior allocation determines how water supplies are divided among water users during a shortage. When there is not enough water to satisfy all water users, prior allocation allows a licensee with an older water right to use all the water to which that person is legally entitled before any water can be used by a licensee with a more recent water right.

Based on water law in the United States, the principle of prior allocation provides security for those who have older water rights. This is important because the financial success of water use projects depends on maintaining a reliable supply of water.

In the 1894 law, the "age" or priority of a water right was based on the date of the licence or the authorization to begin construction. This was changed in 1898 so that the number of the licence became the basis for determining prior allocation. Although not stated explicitly in the law, the numbering of licences is based on the date of application for the licence.

To provide additional protection for those who depend on an adequate supply of water, the 1894 law also had the following features:

- inclusion of only a limited number of reasons for cancelling a water right, for example, wasting water or failing to obey the law,
- no provision for a restriction on the length of time during which a water right is valid,
- a requirement (removed in 1931) that no water right could be granted that would deprive someone of water for domestic purposes,
- a requirement that a supplier of water cannot discriminate between customers based on price, and

- a stipulation that, during a shortage, a licensed supplier of water must pro-rate the available supply among its customers, that is, each customer should receive the same percentage of the supply to which the customer would normally be entitled.

The last two provisions were included to allay fears that companies supplying water would take advantage of their customers. The last provision for sharing water during a shortage only applies to customers of a licensed water user and does not affect the principle of prior allocation.

1895 - Government Ownership of Water

Originally, the ***North-West Irrigation Act*** gave the federal government ownership of the right to use water. In 1895, the law was changed so that the government owned the water as well. This change strengthened the government's ability to maintain orderly, centralized regulation of water management.

A licence is issued only after construction has been properly completed, any water supply agreements had been made, and right-of-way has been obtained.

1908 - Drainage

In 1908, the addition of a special provision addressed the problem of how to manage a situation where there is too much, rather than not enough water. This provision was the first specific regulation of projects for draining land. Although a licence and other normal approvals are not necessary, this provision requires that the impact of the drain or ditch be examined.

Licences for drainage projects were introduced into the legislation in 1971.

1914 - Three Changes to Provide More Flexibility

In 1914, three changes were instituted that gave water rights administrators more flexibility. First, it was decided that the public did not need to be notified about every project that was proposed. ***The Irrigation Act***, as it was then known, was changed to allow the requirement for public notification to be waived if doing so was "expedient and fit and proper."

Similarly, a permit system was introduced so that if it was "expedient and fit and proper", water could be diverted for projects that had been authorized but had not yet met all the requirements for a licence. This provision made it possible for incomplete projects (usually large irrigation projects) to begin operation and thus provide much needed water to their customers.

The final important change in 1914 was the addition of a clause that exempted riparian landowners from the requirements of the ***Irrigation Act*** when they use water for domestic purposes. This part of the legislation has been altered several times since and currently gives the riparian landowner the right to divert water to a tank, cistern, trough, or dugout to meet domestic requirements.

1919 - Legislation on Water Power

In 1919, after failing in its efforts to regulate hydroelectric development through public lands legislation, the federal government passed a law to govern the development of water power. Called the ***Dominion Water Power***

Act, this law applied to water power projects on lands administered by the federal government which, at the time, included most of the public land in Alberta.

This new law resulted in a licensing system similar to the one contained in the *Irrigation Act*. The one notable exception was that the prior allocation doctrine was not applicable to water power projects. This exception was removed in 1984.

1920 - Reallocation and Reservation

Potential water shortages in Southern Alberta led to two major changes in the *Irrigation Act* in 1920. The first change was the creation of a reallocation priority that allows water rights to be transferred from a lower priority use to a higher priority use. There is a requirement that the lower priority user will be compensated for lost water rights.

The order of priority (from the highest to the lowest) was initially set at: 1. domestic, 2. municipal, 3. industrial, 4. irrigation, and 5. other. Water power was assigned the fifth priority in 1939 and irrigation was moved to third priority in 1975. Also in 1975, the "other" category was deleted, having been superseded in 1971 by a list of more specific purposes such as flow regulation and the propagation of fish and wildlife.

The reallocation priority makes it possible for some water users, particularly municipalities, to obtain water from heavily allocated streams. This was a concern in 1920 because of the large allocations of water that had already been granted for irrigation. It has never been necessary to use the reallocation priority.

The other major change in 1920 was the establishment of the reservation power. This power allows the government to reserve any unallocated water so that the Cabinet can determine how the water can be used to "best advantage" and then authorize allocation of the reserved water "in the public interest."

The reservation power allows the Cabinet to prescribe an order of precedence for allocations that is different from the principle of prior allocation. The actual allocation of reserved water must comply with normal licensing requirements.

The reservation power has been used on several occasions in Southern Alberta. It enables the government to protect water for future uses. It also creates some breathing room to allow plans to be prepared concerning how best to manage scarce water supplies.

PROVINCIAL ADMINISTRATION

Although Alberta became a province in 1905, control over the province's natural resources, including water, was not relinquished by the federal government until 1930. This change occurred through the *Natural Resources Transfer Agreement* and was designed to give Alberta the same control over its resources that the original provinces had.

1931 - Creation of the Water Resources Act

After gaining control of its natural resources, the Government of Alberta made a number of changes to its legislation, including, in 1931, the passage of a new water management law called the *Water Resources Act*.

The ***Water Resources Act*** combined provisions from both federal water management laws: the ***Irrigation Act*** and the ***Dominion Water Power Act***. Most of the provisions from these federal laws were transferred intact. The ***Water Resources Act*** also added three significant provisions to water management law:

- in compliance with the ***Transfer Agreement***, water rights issued by the federal government continued to be valid and were subject to the ***Water Resources Act*** only insofar as the provisions of the Act are not "inconsistent with the terms upon which" the rights were granted.
- water rights were made appurtenant[1] to the land or undertaking, and
- the Cabinet was given the power to transfer water rights.

The Cabinet's power to authorize the transfer of water rights provided a more flexible alternative to the already existing power to transfer water by reallocation from a lower priority use to a higher priority use. The Cabinet's transfer power has occasionally been used to permit the transfer of water rights from one parcel of land to another.

1948 - Amendment of Licences

In 1948, the ***Water Resources Act*** was altered to allow the amendment of licences with the consent of the licensee. This modification recognized that water use requirements sometimes change and licences may need to be revised accordingly.

The power to authorize licence amendments belongs to the Cabinet. The actual amendment is made through an agreement with the licensee. Only licences issued under the ***Water Resources Act*** and the ***Dominion Water Power Act*** can be amended. Originally, the water rights in an amended licence could not be reallocated to a higher use. This exemption from reallocation was deleted in 1971.

1953 - Construction and Cost-Sharing of Government Projects

After assuming responsibility for the Province's water resources, the Government of Alberta took an increasingly active role in administering water management projects. This included the construction of dams and other works, the takeover of financially troubled irrigation districts, and the rehabilitation and operation of abandoned water supply projects.

By the middle of the century, it became necessary to clarify the government's powers and obligations. In 1953, a series of amendments were made that allowed the government to construct and operate its own water management projects and to enter into cost-sharing agreements with municipalities concerning the development of local water management projects.

1960 - Flood Control

Aside from the regulation of drainage, the focus of Alberta's water management legislation has always been on the problems caused by too little water. In 1960, the problem of too much water was again highlighted when the ***Water Resources Act*** was expanded to include the management of flood-prone land. This was accomplished by an amendment that allows the provincial government to regulate land use and expropriate property in locations

1 "Appurtenant" means that a right is attached to another property right (in this case, the ownership of the land or undertaking).

where there is a serious flood hazard. Public hearings are mandatory if requested by anyone affected by an order to remove a structure or alter a land use.

1962 - Ground water

When the ***North-West Irrigation Act*** was proposed in 1894, the intention was to regulate the use of ground water in the same way as surface water. All reference to ground water in the Act was removed, however, because of uncertainties about rights to well water for domestic use. Ground water was finally added to the ***Water Resources Act*** in 1962 and during the next fifteen years all wells and other ground water diversions in the province were gradually brought under the administration of the Act. This ensured a more orderly administration of water rights since all water became governed by the same set of rules.

1971 - Conditions in an Interim Licence, Regulation of Government Projects, Permits, and Natural State Licences

Several changes were made to the ***Water Resources Act*** in 1971 that are significant.

The first change was the power to add conditions to the interim licence, the document that allows a project to be constructed. This change not only gives the government better control over how a project is built, but it allows the Government to grant the holder of an interim licence the right to use water before the licence is issued. This eliminated the need for the water user to obtain a special permit to use water prior to receiving the licence.

The second significant change in 1971 was the new requirement that water management projects belonging to the provincial government would be governed by the ***Water Resources Act***. Previously, provincial (as well as federal) projects had been exempt from the Act's requirements. Although government projects had always adhered to the highest standards of construction, this change in the law ensured that there would be equal treatment in the regulation of private and public undertakings.

The third significant change in 1971 was a much wider definition of the non-consumptive activities that are regulated under the ***Water Resources Act.*** Previously, the Act had focused on how to manage activities that withdraw water. Changes in 1971 made it possible to issue permits for projects like streambank protection and bridge and pipeline crossings that do not consume water, but may, if not properly constructed, cause harm to downstream water uses or to the environment.

The wider definition of non-consumptive activities also included the ability to issue licences to use water in "its natural state" for conservation, recreation, or the propagation of fish or wildlife. This change makes it possible to establish water rights for the protection of lake levels and instream flows.

1975 - Managing a Scarce Resource and Safety

To deal with the problems of water scarcity, a provision was added to the ***Water Resources Act*** in 1975 for handling emergencies. This provision allows the Cabinet to suspend licences during an emergency and to reallocate the available water. Holders of interim licences or licences are entitled to compensation for losses incurred because of the Cabinet's actions.

The inclusion of this emergency power gives the government a powerful tool for managing water shortages. It not only offers the opportunity for swift action, but a more flexible system of allocation than is normally possible.

Also in 1975, the Cabinet was given the authority to establish regulations governing the safety of water management works. This led to the creation of Alberta's "Dam and Canal Safety Regulations" which require adherence to strict guidelines of design and construction.

1981 - Ownership of All Water in the Province and Temporary Authorizations

Over the years, numerous changes have been made to the ***Water Resources Act*** in an effort to provide clearer definition of the government's ownership of water. Part of the need for clearer definition has come from a continuing re-evaluation of what kinds of water need to be regulated. Today, it is realized that, to be both effective and fair, all water in the province should be governed by one regulatory system.

Prior to 1981, the declaration of government ownership of water applied to water found in rivers, streams, or other bodies of water. In 1981, the Act was amended to state that all water on or under the surface of the ground is owned by the provincial government. In 1981, a change was also made so that the temporary diversion and use of water could be authorized. This made it possible to regulate activities like dugout filling and emergency pumping that occur on an irregular basis.

SUMMARY

The ***Water Resources Act*** that exists today is a complex arrangement of rules and procedures.

To meet the constraints imposed by riparian rights, government ownership of water was established. Today, that means ownership of all surface and ground water in the province.

To ensure orderly water management, a regulatory system has been created that in one way or another affects all aspects of water management. This includes the allocation of water to withdrawal uses like irrigation, the regulation of activities such as dam construction and pipeline crossings, and the authority to grant water for natural state uses like the propagation of fish and wildlife.

To protect water users, a series of provisions have been created that specify how water will be allocated and used. Most prominent among these provisions is the principle of prior allocation. However, there are also many other important provisions such as public notification of proposed projects, cancellation of licences for wasting water or failing to obey the law, and the Cabinet's powers to reserve water and to manage water during an emergency.

To encourage the most effective use of water, the Act includes provisions for adjusting water rights to meet changing circumstances. These provisions are the power to amend a licence through negotiation with the licensee and the ability to transfer water rights either by Cabinet order or by use of the reallocation priorities.

The next two sections will describe the strengths and weaknesses of ***Water Resources Act***. They will show where the Act works effectively, but they will also describe how the Act does not provide water users and water managers with all the tools they need to make the most beneficial use of our water resources and to protect water users and the environment from unwanted impacts.

WATER RIGHTS

INTRODUCTION

The ***Water Resources Act*** of Alberta deals with the management (allocation and control) of the water resources in the province. It establishes the Province of Alberta as the owner of all water in the province and also places the responsibility for its allocation and control on the province.

The ***Water Resources Act*** was originally designed to provide secure water rights, primarily for the purpose of irrigation. It has been amended over the 100 years of its history, but its basic principles have remained unchanged. Those principles were not designed to deal with the heavy demands placed on water supplies during the 1970's, 1980's and early 1990's (see figures 1 and 2) and they do not properly address the questions that arise when river basins reach the point of full allocation.

The province allocates the right to consume or use water (except for domestic purpose as defined in the Act) by granting water rights in the form of licences or permits to applicants. These rights entitle the licensee or permittee to divert and use water for specific purposes (e.g. municipal, irrigation and other agricultural, industrial). The province also grants rights to construct within the beds, banks or shores of streams and lakes (e.g. pipeline crossings, bridge construction). These construction projects must receive approval to ensure the development will not interfere with present or future development, conservation or management of water.

The development of the province during the last 100 years and the related need for secure water supplies during years of low natural runoff has resulted in many areas of the province approaching the limits of sustainable use of the available resource.

The present Act does not specify the criteria to be used by the government in deciding whether to issue water rights or address the question of when licences should not be issued in heavily allocated basins. It places major restrictions on the transferability and reallocation of water rights and thus makes it extremely difficult for anyone to acquire water rights in basins that are already fully allocated. In addition, the Act makes no direct provision for the implementation of minimum flow requirements within river basins for environmental purposes.

The Act creates little incentive for licensees to conserve water or to become more efficient in water use.

CURRENT PRACTICE

Obtaining a Licence

An application for a licence under the ***Water Resources Act*** is submitted to the Controller of Water Resources, Department of Environment.

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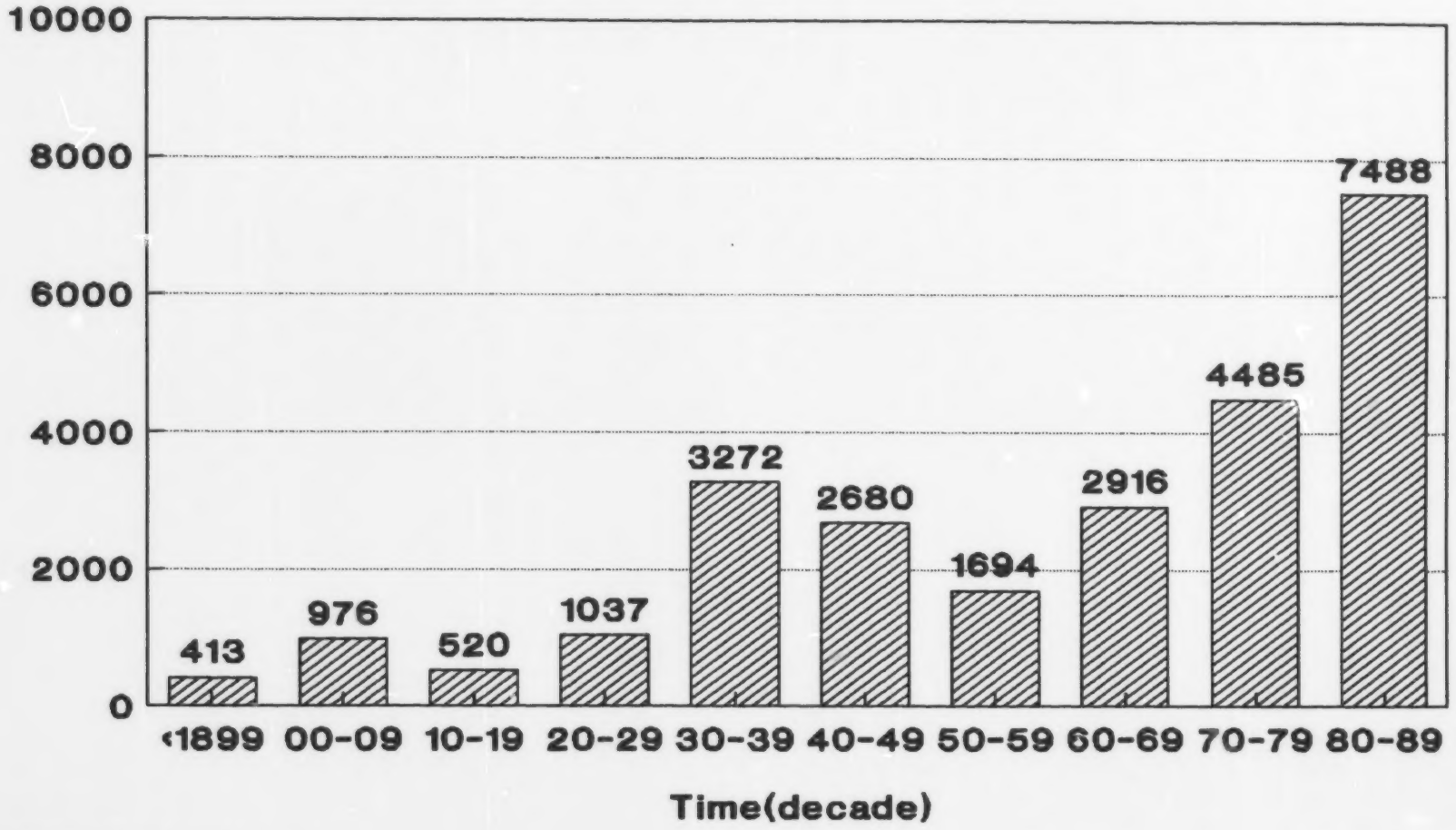
TOTAL NUMBER OF APPLICATIONS RECEIVED
(per decade)



PREPARED IN SEPTEMBER 1991

FIGURE 1

TOTAL NUMBER OF ACTIVE PROJECTS IN PRIMARY RIVER BASINS

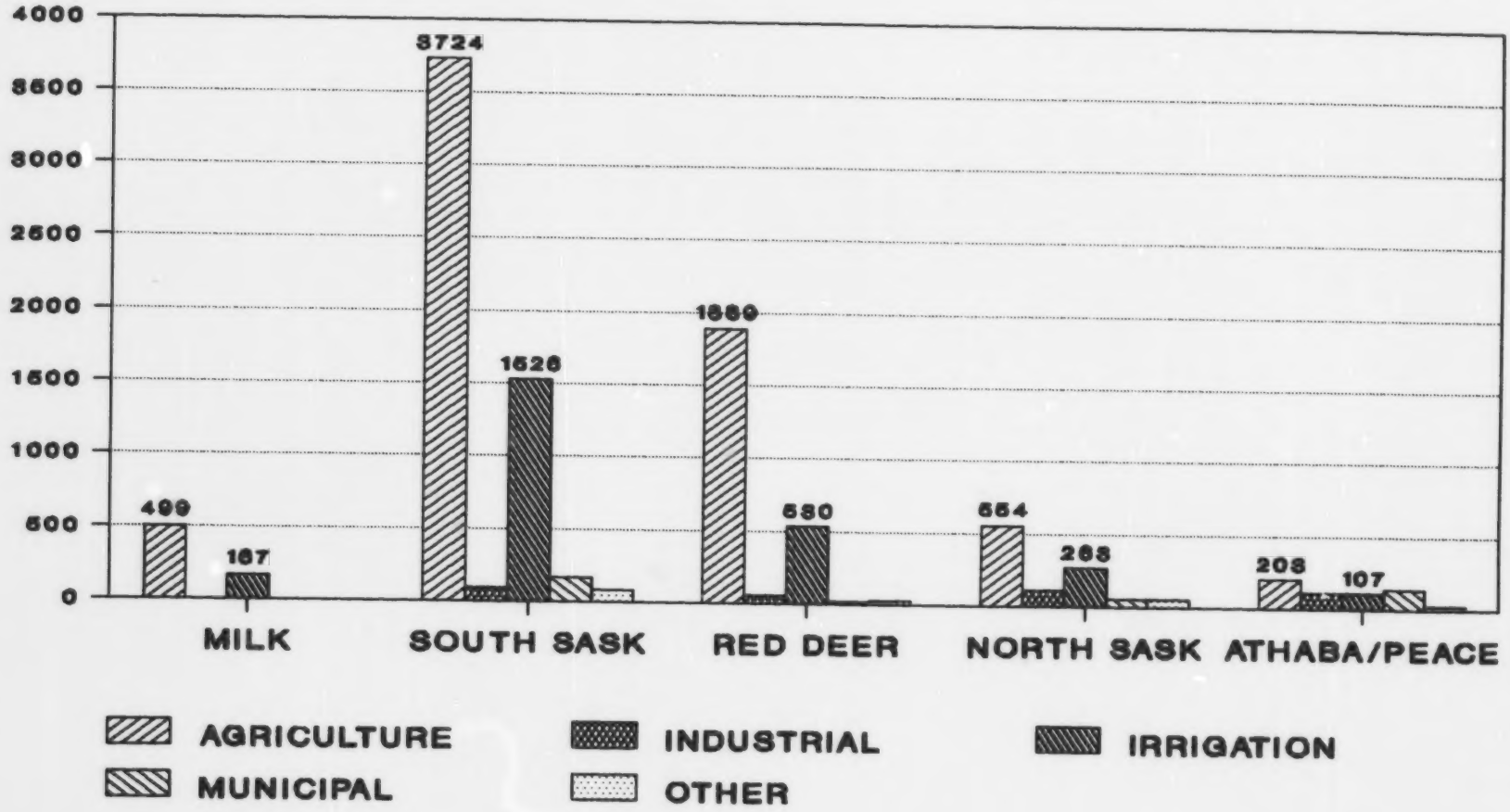


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FIGURE 2

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As provided for in the Act, a notice of the filing of an application for a licence is forwarded to the secretary treasurer of the municipality in which the site of the proposed work is located and to the applicant who must post it on the site of the proposed work. Alternatively, public notice may be published once a week for two successive weeks in the local newspaper. In practice, this is the most commonly used procedure. The plans and application are available to the general public for inspection in the Water Rights office of the Department of Environment. Where it is requested by the applicant and where it is approved by the Controller of Water Resources, the requirement for public notice may be waived.

During review of the application, copies of the application and plans are sent to various branches and divisions of the department (e.g. Dam Safety, Hydrology, Hydrogeology) for their comments. Interdepartmental referrals also take place (e.g. Alberta Forestry, Lands and Wildlife when impacts to fisheries may occur; Alberta Culture when impacts to historical resources may occur).

Any objections or concerns in response to public notice or referral must be addressed by the applicant. Once this is completed an interim licence is granted and this is followed by a permanent licence after the project is constructed.

It is also possible for the Lieutenant Governor in Council (Cabinet) to reserve unallocated water from the ordinary licensing system and to licence the use of that water in the public interest. This power was used on a number of occasions to provide secure water rights for irrigation and major hydro electric projects.

Times of Water Shortage

The Act states that water is allocated among licensees according to the seniority (priority) of their licence. Licensees obtain seniority to water according to the date at which a complete application for licence is filed with the Controller of Water Resources. If there is insufficient water to satisfy the needs of all licensees, the Act entitles a senior licensee to receive the whole of the amount set out in his or her licence before a junior licensee can receive any water. This priority is enforced, if necessary, by closing down the works of junior licensees until the senior licensee has received the full quantity of water to which he or she is entitled.

For example, under the priority system, if in a given river licensee #1 is entitled to receive 500 acre-feet of water, licensee #2 - 750 acre-feet of water and licensee #3 - 200 acre-feet of water, licensee #1 is entitled to receive all 500 acre-feet of water before licensee #2 or #3 can take any water. Similarly, licensee #2 can take 750 acre-feet of water before licensee #3 is entitled to receive any water at all. During times of shortage, the priority principle provides the main method of allocating water. In practice licensees have frequently co-operated with requests to cut back proportionately on their water use.

In years of extremely low flows, the Act, as amended in 1975, provides that the Lieutenant Governor in Council (Cabinet) may declare an emergency and designate the purposes for which water may be used in any area of Alberta. Any losses incurred by senior licensees due to these actions may be subject to compensation.

Licence Modifications and Transfers

The Act makes no provision for modifying existing licences and enables the Minister to cancel a licence only where a licensee has ceased to exercise the rights granted under a licence or where the licensee has breached some term of the Act or the licence. In addition, the Minister may cancel the licence if it was issued in error or if there was fraud on the part of the licensee. The Minister is also entitled to cancel or amend a licence if the licensee is found to have wasted water (wasting is not defined in the Act).

The Act now provides that a licence is inseparably appurtenant (attached to) the specific land or project in respect of which is was issued, although the Lieutenant-Governor in Council (Cabinet) is authorized to make exceptions to this. A water licence can be freely transferred to the new owner of the land or project, provided that the water is put to the

same use. The only other method of acquiring an existing water licence is established by Section 11 of the Act which provides the following precedence in water use: (i) domestic, (ii) municipal, (iii) irrigation and agriculture, (iv) industrial, (v) water power, (vi) other similar purposes. Under section 11, a user for a purpose that is higher on this precedence list can acquire the water right of someone who uses water for a lower purpose, by expropriation if necessary. Payment of compensation for the loss of a water right is required. Thus, for example, a municipality can acquire the whole or part of the water licence of an irrigation district, but an industrial user can never acquire a water right that was issued for agricultural or irrigation purposes.

The ***Water Resources Act*** presently creates a variety of problems, some of which are fundamental in nature and some of which impede the management of the Province's water resources.

Fundamental Problems

Transferability of Water Rights

Under the existing Act, once the rights to the available flow of water in a given basin have been granted to licensees, there is no general method of making water available to new users.

The restrictions on transfer described in the previous section effectively prevent a new water user in most instances from acquiring a portion of the rights of an existing licensee. If a river is fully allocated, or approaching full allocation, the new user will either be unable to obtain any water rights or will obtain a licence that is so junior that it provides no security of supply in times of shortage.

The restrictions on transfer when combined with the inability of the Department to modify rights held under existing licences have created almost total inflexibility in the present system.

In order to provide the necessary flexibility under the Act, the following issues could be considered:

- the extent to which water rights should be transferable;
- the conditions under which the transfer of water rights should be permitted;
- the extent to which the Controller of Water Resources should be able to modify or cancel the rights under existing and new licences;

Increased flexibility in this area could provide for a number of changes which would allow the licensee to enhance his or her operations:

- a change in point of diversion;
- change of place of use;
- a change of purpose.

The need for precedence of use (see figure 3) should be reviewed;

- any combination of the above; and,
- an increase or decrease in amount allocated.

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The Absence of Incentives to Conserve

Water rights have traditionally been issued without any specific duration and have been considered perpetual in nature. The licensee pays a nominal fee, one time only, for the right to use water (there is no fee for an annual allocation of 50 acre-feet or less). Although Alberta has had an impressive history of securing water conservation through voluntary co-operation, the fact remains that the present Act provides little incentive for licensees to use less water.

Absence of Provision for Protecting Instream Flow Needs

The Water Resources Act was primarily designed to regulate the use of water for consumptive purposes. Some sections, such as 11(1)(c), providing for natural state licences, have been introduced to permit the recognition of environmental values. Items that could be considered include:

- the extent to which the Controller should be able to take into account instream flow needs when considering whether to issue new licences;
- how instream flow needs can be provided for in fully allocated basins;
- the extent and circumstances to which the Government should be free to exclude certain stretches of river or bodies of water from the ordinary licensing system.
- whether natural state licences should be junior to all existing licences?

No Provision for River Basin Plans

From time to time, Alberta Environment engages in extensive river basin planning, especially where present or potential developments threaten to create conflicts in water use. There is no provision in the Act to permit the use of river basin plans in controlling the ordinary licensing system.

Impediments to Water Resources Management

Clear definitions are required for a variety of issues including:

- water
- domestic
- natural state
- waste
- conservation

There are few provisions for developing and implementing water management guidelines other than through the reservation of unallocated water as provided for in Section 12 of the ***Water Resources Act.*** Should more flexibility be built into the Act?

The present system of prior allocation does not provide for sharing the available water by rotation among users or any other form of rationing in times of shortage. Changes could result in a more feasible procedure to determine how water can best be used during a shortage.

Existing licences prevent the province from making best use of its water resources. There are few provisions for:

- a simple and fair method of altering, revising and updating of licences. Changing terms and conditions of a permit or licence to meet current needs or new standards is very cumbersome. (e.g. requiring an existing licensee to submit accurate details of annual water use.)

- correcting old licences which have deficiencies. For example, some licences have a rate of diversion specified but no maximum annual quantity is stated. This means that licencing records frequently cannot provide an accurate picture of water allocation in the province.

- an instream flow requirement to be added to the conditions of a licence.

The Act prohibits diversion and use of water without approval for any purpose other than domestic use. Should this prohibition be modified by incorporation of specified exemptions into the Act?

Some possible exemptions could be:

- small placer mining sluice boxes;

- construction of small dugouts;

- dewatering around construction sites in cities, towns, etc.;

- watering of stock on rangeland;

- inadvertent diversion of water (e.g. road construction, pipeline installation);

- ground water which, without treatment, is of a quality not suitable for human consumption nor livestock consumption (i.e. saline water); and,

- small quantities of water of less than a specified amount.

The following general items could be considered for inclusion in a new Act:

- provision of a specific appeal process either for the applicant who is refused a licence or for objectors to a specific application for a licence which receives an approval.

- specification of land classification requirements which are to be followed for licensing of irrigation projects.

- certain activities currently requiring approval under section 11(1)(e) of the Water Resources Act are of a routine nature. These activities could be controlled by regulation which could specify design guidelines, the need to comply with fisheries timing constraints and other conditions including the need to notify the department prior to construction. Field monitoring for compliance with the

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regulations could thus replace the issuing of an approval for projects such as small bridge and pipeline crossings.

- provisions to govern the use of water diverted in previous years which has been stored in a reservoir. Should water stored from the previous year be added to the current year diversion and thus provide a quantity over and above the allocation for use by the licensee during the current year?

- the Act currently provides that right-of-way must have been acquired by the licensee before issuance of a licence and also provides for registration of right-of-way under the Act (by department staff) in certain cases. The need for government to be involved in right-of-way at all should be examined. Perhaps the onus should be clearly on the applicant.

- standards for reclamation of diversion and project sites. Erosion control and bank reinforcement projects would be included.

ENFORCEMENT

INTRODUCTION

The ***Water Resources Act*** includes enforcement provisions in order to ensure compliance with the Act, and with the terms and conditions of licences and permits issued under the Act. Enforcement is designed to serve as a deterrent to non compliance, and is a means to correct problems that are harmful to the environment and/or sound water management.

Enforcement of the ***Water Resources Act*** has the following objectives:

- To ensure compliance with the purposes of the Act, including protection of the water rights of all water users.
- To monitor approved projects to ensure that the terms and conditions of approvals (licence or permit) are complied with.
- To ensure that unapproved works are licenced or do not continue to operate.

BACKGROUND

History of Enforcement

The ***Federal North-West Irrigation Act*** of 1894 provided the framework for Alberta's water resources legislation. In 1930, the federal government passed control of natural resources to the provincial government and the ***Water Resources Act*** was enacted in 1931 to manage the province's water resources.

Prior to 1981, there were very few enforcement actions, primarily because most surface water problems (such as those between neighbours) did not fall within the Act, and were therefore governed by the principles of common law.

In 1981 the adoption of a wide definition of water brought under the Act almost any conduct that had anything to do with naturally occurring water. This change reflected the importance of the water resource, but it had the side effect of bringing within the scope of the Act a number of water problems that were previously dealt with exclusively by the common law. This development led to a large increase in the number of situations requiring enforcement under the ***Water Resources Act***.

Alberta Environment has the responsibility for enforcing the terms and conditions of the thousands of water rights granted under the Act, and for monitoring all water use. The Act makes it an offence for a person to divert or use any water found on or under the surface of the ground within the province. The Act does, however, allow for a person who owns or occupies land that adjoins a waterbody or watercourse or land under which groundwater exists to use as much water as he requires for domestic purposes on that land.

Current enforcement of the ***Water Resources Act*** employs the following techniques: requests for compliance, prosecution, Ministerial Orders to direct compliance with an interim licence or licence, Ministerial Orders to render works ineffective, Ministerial authorization for department staff and

equipment to enter upon land and to render works ineffective, and Ministerial Orders to direct steps necessary for the protection of a water supply.

Recent Alberta Environment enforcement activities have related to the diversion of water for irrigation or drainage without an interim licence or licence; disturbance of the bed and shore of a lake, waterbody, river or watercourse without a permit; the construction of a dam on a creek or watercourse without an interim licence or licence; the failure to comply with the terms and conditions of an interim licence, licence or permit; and relocation (diversion) of a creek or watercourse without an interim licence or licence.

Table 1 shows the number of investigations by Alberta Environment staff during the last four years.

TABLE 1

FISCAL YEAR ENDING	INVESTIGATIONS OF ALLEGED VIOLATIONS	MINISTERIAL ORDERS ISSUED	PROSECUTIONS
1988	292	3	0
1989	281	4	3
1990	302	2	2
1991	319	1	3

In addition to investigating complaints under the Act, staff have often been asked to resolve disputes between individual landowners over surface water, especially since the adoption of the expanded definition of water in 1981. Many of these disputes do not provide sufficient evidence to support enforcement action, but staff often act in an advisory or even conciliatory manner in an effort to resolve disputes. The number shown for Investigations of Alleged Investigations in Table 1 includes these investigations as well as the large number of investigations of violations where the matter is resolved to the satisfaction of the department.

Alberta Environment's Procedure When Violations Occur

When an alleged violation of the ***Water Resources Act*** occurs, Alberta Environment staff investigate and gather all related evidence. Upon completion of an investigation, enforcement action may be recommended. As a first step, staff request the compliance of those who caused the violation to restore the original condition or to mitigate the damage.

Once staff have concluded that further enforcement or prosecution may be warranted, the matter is referred to an interdepartmental committee known as the ***Water Resources Act Enforcement Committee.*** This committee, composed of representatives from Alberta Environment, Alberta Forestry, Lands and Wildlife, a solicitor from the Department of the Attorney General and representatives of other appropriate departments, facilitates a co-ordinated government approach. The committee's purpose is to provide advice and recommendations on the enforcement action being recommended, and to ensure that enforcement under all relevant legislation is considered.

Current Options Available For Enforcement

There are several options for enforcement currently available under the ***Water Resources Act***. These include Ministerial Orders, prosecution and ministerial authorization.

a) Ministerial Orders

i) To Correct a Violation

A Ministerial Order can be issued under Section 73(4) of the Act to order the responsible person(s) to correct a water management problem. Charges can be initiated for failing to obey an Order (Section 60).

Prior to a decision on whether to issue a Ministerial Order, a meeting is held between the alleged offender, the department staff involved in the investigation and the department staff member who is responsible for issuing a Ministerial Order. This meeting is an opportunity for the alleged offender to hear the allegations and provide any additional information to be considered before a decision is made on possible action under Section 73(4).

ii) To comply with the Terms and Conditions of an Interim Licence or Licence.

A Ministerial Order can be issued under Section 42(2) of the Act to the holder of a licence or interim licence to take immediate action to remedy a failure to comply with the terms and conditions of the approval or to restore the works to a safe condition. The procedure is the same as that followed for a Ministerial Order to correct a violation.

If the holder of the licence or interim licence does not comply with the Order, the Minister may issue a further Order under Section 42(3)(a) (suspending or cancelling the licence) or apply to the Court for an Order directing the person to comply with the previous Order (42(3)(b)). Failure to obey an Order made by the Court under this section may be treated as a civil contempt of court.

Table 1 shows the number of times a Ministerial Order has been issued in the past four years.

b) Prosecution

Prosecutions are initiated through the Provincial Court of Alberta. The penalties described in Section 62 of the Act apply where no other penalty is expressly provided for in the Act or the regulations. The penalties under Section 62 are:

i) in the case of an individual, to a fine of not more than $2000, or in default of payment, to a term of imprisonment not exceeding 6 months, or

ii) in the case of a corporation, to a fine of not more than $10,000.

In recent cases where individuals were found guilty of violating the Act, penalties have ranged up to $2,000. In all cases, the penalties and fines are much less than the cost of investigations and the damage inflicted upon the water resource.

Table 1 shows the number of prosecutions carried out during the past four years.

c) Ministerial Authorization to Render Unauthorized Works Ineffective

Section 6 of the Act allows the Minister to authorize department staff to enter onto private land where any works were constructed without, or not in accordance with, a permit, interim licence or licence, or to remove any beaver dam or any natural obstruction, where those works divert or interfere with the flow of any water in Alberta. Currently this section is used in emergency situations or where other enforcement actions have been taken, and the problem has not been corrected.

Under Section 6(3) of the Act, the cost of any work incurred by the Minister constitutes a debt due to the Crown, and is payable by the offender.

d) Requiring the Offender to Obtain Approval Under the ***Water Resources Act***

In situations where a violation will have no adverse environmental or water management impact, the offender can be encouraged to apply for approval under the ***Water Resources Act***. In these cases, the possibility of prosecution is still available.

FUTURE OPTIONS OR ALTERNATIVES

There are a number of future directions possible for enforcement under the ***Water Resources Act***, and these will be an important aspect of the Act's review process.

- Should Alberta Environment continue with the present enforcement procedures?
- Should Alberta Environment streamline and modify its enforcement system?

The ***Water Resources Act*** provides for the management of the province's water resource. In addition to the enforcement approach of the ***Alberta Environmental Protection and Enhancement Act*** (AEPEA), this management responsibility may warrant the consideration of additional enforcement options. There is, however, a requirement for consistancy with AEPEA.

- To what extent should the enforcement approach of the new water management legislation differ from that used in the other sections of the AEPEA.

The following are some possible enforcement options and some situations where enforcement options could be developed:

1. Application For An Investigation

Currently, if an anonymous complaint is made in writing or verbally, a decision regarding the need to investigate is made by staff. This system has worked well, as many complainants prefer to remain

anonymous, and their tips have resulted in the correction of violations of the Act. Occasionally, invalid anonymous complaints are made that result in investigations that are unnecessary.

Section 185 of the AEPEA requires a solemn declaration from a person who requests an investigation.

- In order to reduce the costs of investigating complaints that later prove to be groundless, should a written and signed submission be required to commence an investigation for certain types of alleged violations.

2. Right of Entry By Inspectors (Investigation Rights)

Sections 29, 42 and 73 of the current Act are aimed at providing a right for inspectors to conduct investigations, but they do not provide clear right to enter upon private land to investigate unauthorized works or activities.

To clarify the rights of investigators, the new legislation could mirror the right of entry section (Section 16) of the existing Survey Act Legislation, or Sections 23 and 187 of the AEPEA.

Section 16 of the Survey Act allows a surveyor and surveyor's authorized assistants to, using reasonable care, pass over, measure along and ascertain the bearings of any line or boundary, and for those purposes pass over or through the land of any person. The surveyor and surveyor's assistants are liable for any damage caused.

- Should the Act provide a right to conduct investigations and how extensive should this right be?

3. Time Limitation To Take Action

Currently, section 5(4) of the Act provides a time limit of 3 years after the commission of the offence for the commencement of a prosecution.

- Should there continue to be a time limitation on taking enforcement action for construction of or long term of operation of, illegal unauthorized works?

Section 213(b) of the AEPEA has a time limit for prosecution of an offence 2 years after the date on which evidence of the offcence first came to the attention of the Director.

- Should this time limit be calculated from the day of the offence, or from the day of discovery of the offence?

- Should each day that the illegal conduct continues be considered a separate offence?

4. Disputes where Enforcement Action is Not Recommended

Sometimes Alberta Environment investigates disputes that involve surface water and determines that enforcement action cannot be taken under the Act because clear evidence is not available to support a prosecution or issuance of a Ministerial Order.

- Should Alberta Environment have any role in settling these disputes?

- If so, how could these disputes be settled?

- Should the Act contain provisions to allow those involved in a dispute to obtain a simple and fast resolution of it?

5. Notice of Violation

Currently staff advise an alleged offender of a violation verbally and by letter. This process could be replaced with a standardized "Notice of Violation". A Notice of Violation would include a deadline for correction of a violation. A Notice of Violation could be used as a first step prior to a hearing or other enforcement alternatives and would give the violator an opportunity to correct the problem.

6. Hearings

Currently an informal hearing (meeting) is held prior to a decision to issue a Ministerial Order. The hearing is held with between the alleged offender and the individual delegated to issue a Ministerial Order. The hearing is an opportunity for the alleged offender to hear the allegations and provide any additional information to be considered before a decision is made on whether to issue an Order under Section 73(4) or Section 42(2).

- Should a different hearing process be used and should it be set out in the Act?

Other jurisdictions have legislated formats for hearings that are requested by persons receiving a Notice of Violation. The following are examples of processes that are used for hearings in other jurisdictions:

a) Compliance Conference

This provides an opportunity for an alleged offender who received a written notice of violation to request a conference within a specified time period. This approach puts the onus on the offender to respond in order to resolve the violation. The conference provides the recipient of a notice of violation an opportunity to explain the circumstances of the alleged violation, and suggest remedial measures.

b) Consent Order

This involves an agreement aimed at resolving the violation can be entered into by the violator and the representative of government who holds the compliance conference. The consent order is an agreement on a plan to remedy damage caused by the alleged violation and to ensure further compliance. The consent order may include a provision for payment of an agreed upon penalty. If the consent order is not complied with, application may be made to a court to order specific performance of the consent order and such other relief as is appropriate.

7. Orders

Currently, orders can be issued to correct a violation (Section 73(4)), or to comply with the terms and conditions of an interim licence or licence (Section 42(2)).

- Should the legislation also provide for stop orders, or provide for restoration orders issued by the Courts?

a) Stop Orders

Sometimes during an investigation, the investigator observes that the construction of unauthorized works or diversion of water is underway. The investigator currently has no authority to stop the activity, and because of this, the activity can continue until a conviction is obtained. The use of a "stop" order could reduce damage to the water resource by providing the investigator a means to stop the unauthorized activity. Section 201(1) of the AEPEA provides for enforcement orders to stop the unauthorized activity.

b) Restoration Orders

Under current legislation, an offender may be convicted or plead guilty to a charge, pay a fine, but the Court has no power to order the offender to correct the problem. The offender may have even pleaded guilty to disobeying a Ministerial Order (issued under Section 73(4)) to correct the problem. The use of a restoration order issued by the Courts could require an offender to correct or mitigate the problem.

- Should the department be given the authority to make application to the courts for an order requiring restoration?

8. Appeals

Presently, the decisions to issue Ministerial Orders or approvals have no formal appeal process except through the courts. Currently, Public Lands Division of Alberta Forestry, Lands and Wildlife uses an appeal process. Sections 82 and 83 of the AEPEA provides for appeals to an Environmental Appeal Board in several situations. The board consists of persons appointed by the Lieutenant Governor in Council.

- Is it necessary to have an appeal process?

Other jurisdictions use a penalty bond as a starting point for petitions for appeals. If an alleged offender chooses to appeal either the amount of a penalty or the fact of a violation, he or she submits a bond that is equal to the proposed amount of the penalty. The appeal is then heard and if the alleged offender loses the appeal the bond can be applied to the penalty. Under section 88 of the AEPEA, if an application for a stay of the decision is made pending the appeal of an environmental protection order or enforcement order, the Minister can require security for any action that has to be undetaken before the outcome of the appeal. If the Minister confirms the Director's decision to issue the environmental protection or enforcement order, the Minister may order the forfeiture of the security.

9. Enforcement of Priorities during Water Shortages

The ***Water Resources Act*** grants priority in water use according to the seniority of water licences, so that in a fully allocated basin, or during times of scarcity, water use must be closely monitored. The role of Alberta Environment includes instructing junior licencees to cease diversions during critical periods and following up with enforcement action when necessary.

Enforcement can include shutting down the works of junior licencees when the flow available for licenced use becomes less than the demand. To make the most beneficial use of the water, shutdowns are not requested until the demand equals the available supply. Immediate compliance is then necessary. Some users do not comply immediately which causes problems downstream and results in higher priority users not receiving their allocated water. Section 35(3) of the Act gives Alberta Environment the ability to shut down the water withdrawals that licenced water users have underway.

- If the user refuses to shut down, what effective techniques should be considered for either enforcing rationing or shut downs?

10. Removal of Beaver Dams and Other Natural Obstructions

Beaver dams or other natural obstructions can cause unwanted flooding, and in some cases result in licenced downstream water users not receiving their licenced allocation. On the other hand, beaver dams and natural obstructions provide reservoirs which landowners can use as a water supply or as a method of "natural" flood irrigation for their land. Landowners may also want to retain a natural reservoir for aesthetic reasons. This conflict of uses often results in difficulty in the removal of these obstructions, as landowners sometimes will not allow access across private land.

Currently, the authority exists under Section 6(1)(b) of the ***Water Resources Act*** for the Minister to authorize persons to enter onto lands to breach or remove a natural obstruction or any dam constructed by beaver.

- Is this an efficient means to resolve the problem or is there any other method to authorize and enforce removal of beaver dams and obstructions in critical situations?

11. Ticket System

This option would allow the use of "ticketing" for certain or possibly all violations of the Act. A ticketing system would give an alleged offender th eoption of either pleading guilty and paying the stipulated fine or going to trial.

A ticketing system could improve administrative efficiency, and reduce enforcement costs by eliminating some court time spent on those who plead guilty.

Alberta Forestry, Lands & Wildlife and the Alberta Solicitor General's department currently use ticketing for violations of some of the legislation they administer. Some other jurisdictions use a Notice of Assessment of civil penalty. This notice advises the alleged offender of the violation, the time of the violation assesses a penalty because the violation wasn't corrected, and provides the opportunity for a hearing.

12. Penalties

Section 225 of the AEPEA uses administrative penalities which are designed to recover the cost of damages, and to mitigate any financial gain achieved by violating the Act. Also, Section 217 of the AEPEA allows for an additional monetary fine where monetary benefits accrued to the offender as a result of the offence.

- Should the ***Water Resources Act*** incorporate such penalties?

Some options used in other jurisdictions are:

a) Systems of Administrative Penalties

This is a legislated penalty system that allows for fines to be applied without the necessity for court actions and judgments. Other jurisdictions have fine systems that use a fixed structure to determine a basic fine and then a formula to determine the fine to be levied. Base fines are determined by classifying the violation as minor, moderate or major, then adjusting the base fine for factors such as repeat violations. These fines are determined by the agency responsible for managing the resource. The offender still has the option to pay the fine, or to proceed through the court.

b) Mitigative Penalties

As a method of compensating for damages caused by a violation should provisions exist for the violator to be required to construct or fund mitigative works?

13. Notices of Property Affected by Enforcement Proceedings

If provisions existed, a notice could be placed on the title of a property affected by enforcement proceedings. The notice would warn potential land purchasers of ongoing enforcement actions or environmental/water management problems that require correction.

- Should the new legislation include provisions for registering notices against land?

14. Recovery of Costs

Should provisions exist for recovering the cost of investigations or of direct government interventions to resolve water management problems? This approach could ensure that taxpayers do not have to incur costs as a result of the illegal activities of any individual or company. This approach could, however, result in increased government administrative costs.

a) For Investigations

Currently, other than for a single exception found in Section 44(2) of the Act, complaints of violations of the ***Water Resources Act*** are investigated at no charge to the person(s) who may subsequently be found to have violated the Act. Section 44(2) allows the Minister to charge for investigations of allegations of improper construction or operation of works that have been approved under the Act. There is no ability, however, to recover costs of investigations for cases involving illegal activities where an approval has not been obtained.

Sections 211 and 232(3) of the AEPEA provide for recovery of the cost of an investigation.

Provisions for charging the offender for the costs of investigations would have to be contingent upon a guilty plea or a conviction. The provision could have the unintended effect of

encouraging offenders to plead not guilty to an offence and go through a trial in order to avoid having to pay the costs of an expensive investigation.

b) For Direct Government Intervention to Resolve Water Management Problems

Sometimes it is necessary for government to unilaterally correct a violation of the Act at its expense in order to prevent further environmental damage or harm to others. Section 6 of the current Act allows the recovering of costs for these measures, while Section 232 and 235 of the AEPEA contains general cost recovery provisions relating to Orders and emergency measures that have been undertaken.

15. Provisions Relating to Contractors

In many cases, the actual work which violates the ***Water Resources Act*** is carried out by contractors retained by a landowner or landholder. Contractors are sometimes relied upon by their customers to understand legislative requirements for works.

- Should contractors be responsible for ensuring that their actions are not contrary to legislation?

The current Act clearly holds contractors accountable.

Are additional enforcement provisions necessary to ensure the accountability of contractors, including

i) Ability to impound equipment.

ii) Orders and fines for contractors as discussed in the "Orders" section.

iii) A licensing system to ensure that contractors working near/on watercourses or waterbodies are aware of the legislation and their obligations under it.

16. Delegation of Enforcement Action

Currently, Alberta Environment enforces the ***Water Resources Act***.

In Alberta, administration of legislation such as the ***Soil Conservation Act*** is delegated by the province to the Agricultural Service Board in each local authority (county, municipal district, or improvement district). Alberta Agriculture then has the ability to place enforcement of legislation at a local level.

The ***Litter Act*** is an example of local government involvement in enforcement. Rather than delegate enforcement, that Act defines "enforcement officer" to include municipal police officers and persons appointed by the Minister or a council of a local authority. Enforcement officers can enforce the requirements of the Act. In situations where local authorities fail to enforce their local by-laws, enforcement officers can request the Director of Pollution Control to require the local authority to enforce its by-law. Should they fail to enforce their by-law, the Director can then issue an order under the Act.

- Should enforcement of the ***Water Resources Act*** or parts of it be delegated to local governments?

17. Annual Report

Currently, an annual report on enforcement of the Act is not available to the public.

The review panel on environmental law enforcement, in the publication "An Action Plan for Environmental Law Enforcement in Alberta" recommended that an annual report be published which outlines all environmental enforcement actions that have been initiated, the status of these actions, the success of the actions, and a summary of the record of compliance with others.

- Should an annual report be made available to the public, and if so, should it contain the names of those accused or convicted under the Act?

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